No. 89-680

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

JAMES B. BEAM DISTILLING CO.,

Petitioner,

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Respondents.

On Petition For Certiorari
to the Supreme Court of Georgia

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Counsel of Record for Petitioner:
JAMES B. BEAM DISTILLING CO.,

JOHN L. TAYLOR, JR.
VINCENT, CHOREY, TAYLOR & FEIL
A Professional Corporation
Suite 1700, The Lenox Building
3399 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 841-3200

MORTON SIEGEL
SIEGEL, MOSES & SCHOENSTADT
10 East Huron Street
Chicago, Illinois 60611
(312) 664-8998

Additional Counsel:

MICHAEL A. COLE
VINCENT, CHOREY, TAYLOR & FEIL
A Professional Corporation
Suite 1700, The Lenox Building
3399 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 841-3200

In the Supreme Court of Georgia

Decided: July 14, 1989

46642, 46681, JAMES B. BEAM DISTILLING V.
STATE OF GEORGIA, et al.; and vice versa

MARSHALL, Chief Justice.

James B. Beam Distilling Co. (Beam) brought this action seeking a $2,400,000 refund for excise taxes it paid in 1982, 1983 and 1984. The taxes were paid pursuant to OCGA §3-4-60, which imposed a higher tax on alcoholic beverages imported into the state than on those manufactured in Georgia. The statute was amended in 1985, shortly after the United States Supreme Court found a similar statute to be unconstitutional. See, Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (104 SC 3049, 82 LE2d 200) (1984).[1] In the proceedings below, the trial court determined that the pre-1985 statute was unconstitutional because it violated the Commerce Clause of the U.S. Constitution. The court further held that the ruling would only be applied

---

[1]The amended statute has been challenged and found to be constitutional. See, Heublein, Inc. v. State, 256 Ga. 578 (351 SE2d 190) (1987).

EXHIBIT A

prospectively so that Beam is not entitled to a refund. We affirm.

1. The State appeals the trial court's decision that the pre-1985 version of OCGA §3-4-60 was unconstitutional. We find no error. The statute imposed higher taxes on out-of-state products solely because of their origin. The record demonstrates that the purpose and effect of the statute was simple economic protectionism, which is virtually per se invalid under the Commerce Clause of the U.S. Constitution. Id.

2. Beam asserts that the trial court erred in applying the decision prospectively only. We disagree. In Flewellen v. Atlanta Casualty Co., 250 Ga. 709 (300 SE2d 673) (1983), this Court adopted the three-pronged test set forth in Chevron Oil v. Huson, 404 U.S. 97 (92 SC 349, 30 LE2d 296) (1971), to be applied in deciding a retroactivity question:

> (1) Consider whether the decision to be applied nonretroactively established a new principle of law, either by overruling past precedent on which litigants relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

(2) Balance the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retroactive operation would further retard its operation.

(3) Weigh the inequity imposed by retroactive application, for, if a decision would produce substantial inequitable results if applied retroactively, there is ample basis for avoiding the injustice or hardship by a holding of nonretroactivity.

Flewellen, 250 Ga. at 712. Retroactive application of a judicial decision is not compelled constitutionally or otherwise[2] where unjust results would accrue to those who justifiably relied on the prior rule. Strickland v. Newton County, 244 Ga. 54 (258 SE2d 132) (1979) (decision holding local option sales tax should be applied prospectively to avoid unjust results).

Applying the first prong of the Chevron test, we note that the decision does not now establish a "new rule." However, if the decision had been rendered during 1984, the last year that

---

[2]We are not persuaded by Beam's argument that OCGA §48-2-35(a) mandates retroactive application of the constitutional decision. The statute provides, "A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him..." The statute does not describe how it should be determined that a tax was "illegally assessed." It simply does not address the issue of retroactive versus prospective application of a constitutional decision.

paid in 1982, 1983 and 1984. There are at least two other lawsuits currently pending in which other alcohol producers seek over 28 million dollars in tax refunds on the same grounds. Economic realities lead to the inescapable conclusion that the cost of this tax has or could have been already absorbed by the companies and passed on to Georgia consumers. Indeed, retroactive application of the ruling might well result in a windfall to the alcohol producers.

On the other hand, if the decision is applied retroactively, Georgia faces liability for over 30 million dollars in refunds for taxes it collected in good faith under an unchallenged and presumptively valid statute. Georgia would have to refund large sums of money that it has already spent. Prospective application would avoid imposing a severe financial burden on the State and its citizens. In such situations, this Court and the courts of other states have frequently declined retroactive application, even though the ruling allows an unconstitutional statute to remain in effect for a limited period of time. See, Federated Mutual Ins. Co. v. DeKalb County, 255 Ga. 522 (341 SE2d 3) (1986); American Trucking Association v. Gray, 295 Ark. 43 (746 SW2d

377) (1988) (out-of-state truckers were not entitled to refund of taxes found violative of the Commerce Clause); National Distributing Co. v. Office of the Comptroller, 523 So.2d 156 (Fla. 1988) (prospective ruling appropriate where equities weighed against refund of taxes paid under alcoholic beverage statute); Metropolitan Life Ins. Co. v. Commissioner of Dept. of Insurance, 373 N.W.2d 399 (N.D. 1985) (no refund of taxes paid under statute giving unconstitutional preference to domestic insurance companies).

3. In 1939, this court upheld the precursor to the pre-1985 version of OCGA § 3-4-60 against a Commerce Clause challenge. Scott v. State, 187 Ga. 702 (1939), overruled on other grounds, Blackston v. Georgia Dep't of Natural Resources, 255 Ga. 15 (1985). Now, some fifty years later, we are striking down its successor because it violates the Commerce Clause.

As the dissent points out, there are a number of cases strongly supporting the argument that because the statute was unconstitutional, it was void ab initio. See, e.g., Dennison Mfg. Co. v. Wright, 156 Ga. 789 (1923); Battle v. Shivers, 39 Ga. 405 (1869).

However, the rule of voidness ab initio is not an absolute rule. It has exceptions.

> "The general rule is that an unconstitutional statute is wholly void and of no force and effect from the date it was enacted. This harsh rule is subject to exceptions, however, where, because of the nature of the statute and its previous application, unjust results would accrue to those who justifiably relied on it . . ."
>
> While we have declared statutes to be void from their inception when they were contrary to the Constitution at the time of enactment, . . . those decisions are not applicable to the present controversy, as the original . . . statute, when adopted, was not violative of the Constitution under court interpretations of that period.

Adams v. Adams, 249 Ga. 477, 478-79 (citations omitted) (quoting Strickland v. Newton County, 244 Ga. 54, 55 (1979) (citations omitted)). Other cases have held similarly. E.g. Strickland v. Newton County, 244 Ga. 54, 55 (1979); Allan v. Allan, 236 Ga. 199, 207-08 (1976). In all of these cases, the court has applied its decision prospectively rather than retroactively.

We apply the exception to the general rule. Here the state has collected taxes under this statute or its predecessors

over a half century in reliance on a decision of this court. Under these circumstances and the balancing factors discussed in division two, supra, we hold it would be unjust to declare the statute void ab initio.

In sum, we conclude that prospective application of the decision is appropriate. The decision of the trial court is affirmed in all respects.

Judgment affirmed. All the Justices concur, except Smith and Weltner, JJ., who dissent as to Divisions 2 and 3.

46642, 46681. JAMES B. BEAM DISTILLING COMPANY v. STATE OF GEORGIA et al. and vice versa.

SMITH, Justice, concurring in part and dissenting in part. The problem with this case is that it is too simple. All that is involved is a statute which has been declared unconstitutional, a constitutional provision which requires this Court to declare the unconstitutional statute void, and a statute which says taxes erroneously to illegally collected must be refunded. This case involves the state's illegal collection of taxes from a single, readily-identifiable party on the basis of an

unconstitutional statute. The majority has successfully avoided the clear mandate of the Georgia Constitution, Georgia case law, and the Georgia refund statute. The "complicated exceptions" which the majority pointed out only make the simplicity of this case more pronounced. In short, the majority opinion is an excellent example of the judiciary attacking the solid rock of established Georgia constitutional law and Georgia case law with a hoe and trying to convince everyone that it's a bulldozer.

TAXPAYER'S RIGHTS

By placing emphasis on the issue of whether the decision in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (104 SC 3049, 82 LE2d 200) (1984)[3] should be given a retroactive application, the majority disguises the real issue: Which is more important in

---

[3]The Court in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 277 (104 SC 3049, 82 LE2d 200) (1984), declined to address the refund issue. It remanded the case to the Supreme Court of Hawaii to determine the refund issues "which are essentially issues of remedy for the imposition of a tax that unconstitutionally discriminated against interstate commerce..." 468 US at 277. The Court did note, "It may be, for example, that given an unconstitutional discrimination, a full refund is mandated by state law." Note 14. Here the statute unconstitutionally discriminated against non-resident taxpayers and a full refund is mandated by state law.

Georgia--the state's right to protect the ill-gotten gains of the treasury or the taxpayer's right to relief after a clear violation of the taxpayer's constitutional rights? See Tatarowicz, Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause, 41 Tax Lawyer (Fall 1987).

The majority opinion concludes that the state's right to protect its treasury is more important; however, I believe that the right of the taxpayer is more important.[4] The majority found, and I agree, that "the purpose and effect of the statute was simple economic protectionism, which is virtually per se invalid under the Commerce Clause of the U. S. Constitution."

Thus, I concur in the part of the majority opinion that affirms the trial court's holding that the pre-amendment statute was unconstitutional; however, there are several separate and distinct statutory and constitutional issues involved in this case

---

[4]As we celebrate this Fourth of July, we are reminded that one of the sparks which ignited the Revolutionary War was the abusive manner in which the colonists were being taxed by the King. Our forefathers fought and won independence from a King who extracted excessive taxes, and the Constitution was drafted to protect the people from such abuses.

that clearly distinguish it from the cases that have been cited by the majority.[5] Therefore, I strongly disagree with the majority's conclusion "that prospective application of the decision is appropriate."

DISCUSSION OF THE MAJORITY OPINION

1. This Court adopted the test for retroactive application of judicial decisions set forth in Chevron Oil in Flewellen v. Atlanta Casualty Co., 250 Ga. 709 (330 SE2d 673) (1983), but Flewellen did not declare a statute unconstitutional.[6]

The majority also states in division two: "Retroactive application of a judicial decision is not compelled constitutionally or otherwise where unjust results would accrue to those who

---

[5]Only one Georgia case was cited by the majority in division two which allegedly supports its conclusion that "an unconstitutional statute [may] remain in effect for a limited period of time." This case, Federated Mutual Ins. Co. v. DeKalb County, 255 Ga. 522 (341 SE2d 3) (1986), dealt with a repeal of a statute or ordinance by implication. The constitutionality of the statute was not involved. The other cases cited were foreign, and the majority did not show that those states have constitutional provisions similar to Georgia's. Under our constitution a statute is either constitutional and valid or unconstitutional and void. The constitution does not mandate a holding of "partial voidness."

[6]The only issue in Flewellen involved the proper interpretation and application of state insurance statutes.

justifiably relied on the prior rule." As set out in division three of this dissent, there is no question of "retroactive application of a judicial decision" when a statute is declared unconstitutional in Georgia. Once a statute is declared unconstitutional it becomes the constitutional duty of the judiciary to declare the statute void.

2. The majority would have us believe an earlier unsuccessful constitutional challenge in Scott v. State. 187 Ga. 702 (2 SE2d 65) (1939), somehow negates the constitutional mandate requiring this Court to declare the unconstitutional statute void. There is nothing in the Georgia Constitution indicating that reliance upon earlier decisions of this Court in any way changes or modifies the mandate of the constitution to declare unconstitutional statutes void.

THE GEORGIA CONSTITUTIONAL MANDATE

3. Our constitution requires us to declare unconstitutional legislative acts void. Ga. Constitution 1983, Art.

I, Sec. II, Par. V.[7] That constitutional provision does not allow this Court to set a specific date upon which an unconstitutional statute becomes inoperative. It does not allow this Court to determine that a statute is just a little bit void. It does not allow this Court to ignore its clear mandate or the long line of Georgia cases that have upheld the constitutional mandate. Nor can this Court rely on United States Supreme Court decisions that are not on point and in which the Georgia Constitution was never discussed or considered. (See division 5 infra, discussion of Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (60 SC 317, 84 LE2d 329) (1940). Instead our constitution and case law require us to declare unconstitutional acts entirely void from their inception.

> An unconstitutional statute, though having the form, features, and name of law, is in reality no law. It is wholly void. In legal contemplation it is as inoperative as if it had never been passed. It has been declared that it is a misnomer to call such statute a law. Such a statute confers no authority upon any one, and affords protection to no one. Norton v. Shelby County, 118 U.S. 425 (6

---

[7]Paragraph V of the 1983 Georgia constitution entitled "What acts void" states: "Legislative acts in violation of this Constitution or the Constitution of the United States are void, and the judiciary shall so declare them."

Sup. Ct. 1121, 30 L. ed. 178); Ex Parte Siebold, 100 U.S. 371, 376 (25 L. ed. 717); [Cits.]; McCants v. Layfield, 149 Ga. 238 (99 S. E. 877).

In Osborn v. Bank of the United States, 9 Wheat. 738 (6 L. ed. 204), Chief Justice Marshall declared that "it is an extravagant proposition that a void act can afford protection to the person who executes it." In Boston v. Cummins, 16 Ga. 102, 106 (60 Am. D. 717), this court declared that "The unconstitutional acts of the legislature, State and Federal, are not laws; and no court will execute them, having a proper sense of its own obligations and responsibilities." In Wellborn v. Estes, 70 Ga. 390 this court said: "Legislative acts in violation of the constitution of this State or of the United States are void." The constitution of this State declares that "Legislative acts in violation of this constitution or the constitution of the United States are void, and the judiciary shall so declare them." Proceedings under an unconstitutional statute had before such statute is judicially declared to be unconstitutional are void. Jordan v. Franklin, 131 Ga. 487 (52 S. E. 673); Worth County v. Crisp County, 139 Ga. 117 (3) (76 S. E. 747); James v. Blakely, 143 Ga. 117 (84 S.E. 431). (Emphasis supplied in part.)

Dennision Mfg. v. Wright, 156 Ga. 789, 797 (120 SE 120) (1923). See also State Highway Department v. H. G. Hastings Co., 187 Ga. 204, 215 (199 SE2d 793) (1938); Tarpley v. Carr, 204 Ga. 721, 727 (51 SE2d 638) (1949) (City officers were not de facto officers of office created under an unconstitutional charter); Franklin v. Harper, 205 Ga. 779, 784 (55 SE2d 221) (1949); Baggett v. Linder, 208 Ga. 590, 591 (68 SE2d 469) (1952); Milam v. Adams, 216 Ga. 440, 444 (117 SE2d 343) (1960); K. Gordon Murray Productions, Inc. v. Floyd, 217 Ga. 784, 787 (125 SE2d 207) (1962) (". . . the remedy provided in the ordinance is not even law if the petitioner's constitutional attack is sustained.") Dobson v. Brown, 225 Ga. 73, 76 (166 SE2d 22) (1969) ("Not even estoppel can legalize or vitalize that which the law declares unlawful and void."); and Mapp v. First

Georgia Bank, et al., 156 Ga. App. 380 (274 SE2d 765) (1980) (See note 7, infra.)[8]

Although Bacchus may have led this Court to conclude that the Georgia statute, in the present case was unconstitutional, it does not affect Art. I, Sec. II, Par. V. of the Georgia Constitution which provides that an unconstitutional statute is void from its inception. Once the statute was declared unconstitutional, it was as if no statute, case law, or public policy had ever been established. "The Constitution is irrepealable, and any law in violation of it is void--is null; rights cannot grow up under such a law." Battle v. Shivers, 39 Ga. 405, 416 (1869). Once the statute was declared unconstitutional it became inoperative, as if it had never been passed. Therefore, no court having a proper sense of its own obligations and responsibilities will execute it. Dennison, supra, 156 Ga. at 797. The state had no authority to assess or collect the taxes, and this Court has no authority to execute a void statute.

---

[8]The law in this area has been so firmly established that few recent cases discuss the issue.

THERE ARE NO EQUITIES TO BALANCE

4. The majority's discussion of "balancing the equities," is misplaced. When a statute is declared unconstitutional, there can be no balancing of equities as none exist. "[W]e are bound to follow the laws of this state and the decisions of our Supreme Court even when . . . the resulting decision effects a hardship . . . ." Mapp v. First Georgia Bank, et al., 156 Ga. App. 380, 381 (274 SE2d 765) (1980).[9]

---

[9]On May 26, 1976 appellant Mapp purchased an automobile from Ed Cook. The car had been purchased by Cook from Hopkins Chevrolet, Inc., which in turn has purchased the automobile from Timmers Chevrolet, Inc., pursuant to a sale under the Georgia Abandoned Motor Vehicle Act. On October 26, 1976, First Georgia Bank repossessed the automobile, claiming that it held a perfected security interest in the automobile which had been created at the time of the initial purchase by C. J. Wilson. Mapp filed suit against the Bank, alleging that the Bank had illegally converted the automobile. The trial court granted summary judgment in favor of the Bank, concluding that Mapp's title was invalid on the basis of a 1979 case which held the Georgia Abandoned Motor Vehicle Act to be unconstitutional. Since the sale was in accordance with an act which was later held to be unconstitutional, the sale passed no title. The Court of Appeals affirmed the trial court's ruling because an unconstitutional statute is a void statute from its inception and no rights accrue thereunder.

An even more astonishing discovery in reading Chicot is that Chicot cited Norton v. Shelby County the exact same case cited in Dennison, supra, (See division 3 of this dissent) for the proposition that an unconstitutional statute "confers no authority upon any one, and affords protection to no one." See division 3 of this dissent. The Allan opinion ignored the above language with its two citations to Supreme Court decisions and quoted dicta that was completely devoid of a citation to any decision of any court.[10]

In the three cases that represent the "exceptions," the Court in attempting to do equity, did not face the constitutional mandate head-on.

In Allan, Strickland, and Admas, there may have been other individuals who may have been harmed in the past, but they were, for all practical purposes, unascertainable. The amount of damage suffered by other individuals was also almost impossible to determine. In Allan and Adams there was also the

---

[10]The language relied upon by Allan was totally unnecessary in adjudicating the Chict case. The respondents in Chicot failed to raise a constitutional issue in the courts below;

potential of disrupting years of quiet titles and confusing property law.

This case, on the other hand, involves one clearly-identified taxpayer who paid the state an ascertainable amount of money in illegal taxes over a specified period of time; therefore, there is no difficulty in determining to whom the taxes should be refunded and for what amount. In addition, such a refund would not disturb property law.

The "exceptions" are built upon a faulty unconstitutional foundation, and they should fall. They are court-made, but not constitutionally allowed.

THE CONSTITUTION IS THE WILL OF THE PEOPLE

7. The supreme power of this state is in the people and the written constitution is the will of the people. The people have decided that the judiciary must declare unconstitutional statutes void. By looking to dicta of United States Supreme Court decisions--in which our constitution was not at issue--this Court ignores the dictate of the people as set forth in the Georgia Constitution.

collected under state law. The statute includes taxes which are paid voluntarily and involuntarily, thus no element of duress is required nor must a protest be filed. The remedy statute is mandatory rather than directory, and it acts as a waiver of sovereign immunity. Thompson v. Continental Gin Co., 73 Ga. App. 694 (37 SE2d 819) (1946).

Since the General Assembly intended to allow refunds under many different circumstances, it is incomprehensible that the taxpayer in the present case who successfully challenged the constitutionality of the taxing statute is barred from recovery. The key words of the remedy statute are erroneously or illegally assessed and collected. The majority indicates that the state had "no reason to believe that the import taxes were unconstitutional"; however, under the broad language of the statute it makes no difference that the state erroneously assessed and collected taxes under the unconstitutional statute. Erroneously assessed and collected taxes must be returned. Once the taxing statute was declared unconstitutional and void, there was no legal collection of these taxes, nor had there ever been

one. Therefore, the state is illegally in possession of the taxpayer's property.

OTHER CONSTITUTIONAL PROVISIONS WHICH REQUIRE REPAYMENT

9. There are also constitutional provisions which require the return of unconstitutionally assessed and collected taxes. The state cannot deprive a person of property without due process of law. Georgia Constitution 1983, Art. I, Sec. I, Par. I. The due-process clause extends to every proceeding which may be a deprivation of "life, liberty, or property, whether the process be judicial or administrative or executive in its nature. [Cit.]" Zachos v. Huiet, 195 Ga. 780, 786 (25 SE2d 806) (1943). The assessment and collection of taxes in the absence of a valid taxing statute constitutes such an unconstitutional deprivation of property.

10. One of the paramount duties of government is to protect the property of its taxpayers. Georgia Constitution, 1983, Art. I, Sec. I, Par. II. "It is the duty of the State government, through the instrumentality of the courts, to protect the property of a citizen and his right to possess and control it." Irwin v.

Willis, 202 Ga. 463, 477 (43 S.E.2d 691) (1947). This Court must protect taxpayers who have had property erroneously or illegally taken under the auspices of an unconstitutional taxing statute by requiring the state to refund such illegally-collected taxes.[12]

The above constitutional provisions, all found in our Bill of Rights, were enacted to place limits on the government and to protect the people from governmental abuses. The government's authority to tax is powerful. In fact, in 1819 Chief Justice Marshall said:

> [That] the power to tax involves the power to destroy . . . . [is a] proposition[] not to be denied.

McCulloch v. Maryland, 4 Wheaton 316, 431 (1819).

---

[12]An identical question is involved in Marcus Collins v. Waldron and all Retired Federal Employees Similarly situated, No. 47018 argued June 27, 1989. Retired federal employees challenged Georgia's scheme of taxation which taxes the retirement income of federal retirees while exempting the retirement income of state retirees as being unconstitutional. They argued, under the authority of Davis v. Michigan Department of Treasury, ___U.S. _____, 57 U.S. L.W. 4389 (March 28, 1989), that the Georgia scheme is unconstitutional and, therefore, the taxes were illegally collected.

If this Court does not treat the unconstitutional statute as void from its inception, then nothing will deter the state from enacting other unconstitutional statutes and reaping the benefits therefrom. The constitutional mandate to declare the statute void, Ga. Constitution, 1983, Art. I, Sec. II, Par. V, is the taxpayer's protection from the power of the sovereign "to destroy." McCollough, Id.

This Court has placed a great deal of emphasis on the fact that the taxpayer in this case is a liquor company. It does not matter who the taxpayer is--a liquor company or an illegally taxed individual--the taxpayer is entitled to protection under the laws of this state. As former Supreme Court Justice Hugo Black said:

> Good men and bad men are entitled to trial and sentence in accordance with the law.

CONCLUSION

The constitutional mandate requiring this Court to declare the statute void has been ignored. The state's expressed public policy to refund taxes is thwarted just as the remedy statute,

OCGA § 48-2-35, is trampled and, in reality, repealed by this Court. The majority's insistence upon declaring the statute void prospectively only,[13] while ignoring the Georgia Constitution, grants a hollow victory to the appellant who proved the taxing statute was unconstitutional. It also denies a remedy for the unlawful taking of the appellant's property, disregards the mandatory nature of the remedy statute, and sends the message to Georgia taxpayers that this Court will not protect their rights nor require the state to be accountable for taxes unconstitutionally and erroneously or illegally assessed and collected.

---

[13]How can something be applied prospectively if it never existed? The doctrine of nonretroactivity may be used when dealing with a valid statute, law, case law, or a change in law or public policy. It does not apply and is not used in Georgia constitutional cases because the statute, case law, or public policy must, as required by our constitution and case law, be treated as if it never existed.

A BILL TO BE ENTITLED
AN ACT

To amend Title 3 of the Official Code of Georgia Annotated, relating to alcoholic beverages, so as to change certain excise taxes on distilled spirits, alcohol, table wines and dessert wines; to provide an effective date; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1. Title 3 of the Official Code of Georgia Annotated, relating to alcoholic beverages, is amended by striking in its entirety Code Section 3-4-60, relating to the levy and amount of excise taxes on distilled spirits and alcohol, which reads as follows:

"3-4-60. The following state excise taxes are levied and imposed:

(1) On the importation of all distilled spirits imported into this state, a tax of $1.00 per liter and on all alcohol imported into this state, a tax of $1.40 per liter,

and a proportionate tax at the same rate on all fractional parts of a liter;

(2) On the manufacture of all distilled spirits manufactured in this state from Georgia-grown products, a tax of 50 cents per liter and on all alcohol manufactured in this state from Georgia-grown products, a tax of 70 cents per liter, and a proportionate tax at the same rate on all fractional parts of a liter."

and inserting in lieu thereof a new Code Section 3-4-60 to read as follows:

"3-4-60. The following state excise taxes are levied and imposed:

(1) On the importation of all distilled spirits imported into this state and on the manufacture of all distilled spirits manufactured in this state, a tax of $1.00 per liter and a proportionate tax at the same rate on all fractional parts of a liter;

(2) On the importation of all alcohol imported into this state and on the manufacture of all alcohol manufactured in this state, a tax of $1.40 per liter and a proportionate tax at the same rate on all fractional parts of liter."

Section 2. Said title is further amended by striking in its entirety Code Section 3-6-50, relating to the levy and amount of excise taxes on wines, which reads as follows:

"3-6-50. There is levied and imposed on the first sale, use, or possession of wines within this state the following taxes:

(1) On table wine produced within the state from at least 40 percent of fruits and berries grown within the state:

(A) Eleven cents per liter and a proportionate tax at like rates on all fractional parts of a liter on that portion that is produced from fruits and berries grown within the state: and

(B) Forty cents per liter and a proportionate tax on like rates on all fractional parts of a litemo that portion that is produced from fruits and berries grown outside the state:

(2) On table wines produced from fruits and berries grown outside the state, whether produced within or outside the state, 40 cents per liter and a proportionate tax at the same rate on all fractional parts of a liter;

(3) On dessert wines produced within the state, from at least 40 percent of fruits and berries grown within the state:

(A) Twenty-seven cents per liter and a proportionate tax at like rates on all fractional parts of a liter on that portion that is produced from fruits and berries grown within the state; and

(B) Sixty-seven cents per liter and a proportionate tax on like rates on all fractional parts of a liter on that portion that is produced from fruits and berries grown outside the state;

(4) On dessert wines produced within the state

wholly from fruits and berries grown within the state to which wine spirits produced outside the state have been added, 67 cents per liter and a proportionate tax at the same rate on all fractional parts of a liter; and

(5) On dessert wines produced from fruits and berries grown outside the state, whether produced within or outside the state, 67 cents per liter and a proportionate tax at the same rate on all fractional parts of a liter."

and inserting in lieu thereof a new Code Section 3-6-50 to read as follows:

"3-6-60. There is levied and imposed on the first sale, use, or possession of wines within this state the following taxes:

(1) On table wine, a tax of 40 cents per liter, and a proportionate tax at the same rate on all fractional parts of a liter;

(2) On dessert wines, a tax of 67 cents per liter, and a proportionate tax at the same rate on all fractional parts of a liter."

Section 3. This Act shall become effective upon its approval by the Governor or upon its becoming law without his approval.

Section 4. All laws and parts of laws in conflict with this Act are repealed.

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAMES B. BEAM DISTILLING CO., a Delaware Corporation,	§	
Plaintiff,	§	CIVIL ACTION
	§	FILE NO. D-42527
v.	§	
STATE OF GEORGIA, JOE FRANK HARRIS, Individually and as Governor of the State of Georgia, MARCUS E. COLLINS, Individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,	§	
Defendants.	§	

FINAL ORDER

This action came on for hearing on Cross Motions for Summary Judgment filed by plaintiff and defendants. The questions presented for resolution by the Court are whether O.C.G.A. § 3-4-60, as that statute existed and was applied in 1982, 1983 and 1984 (prior to its amendment in 1985) violated the Commerce Clause and the Equal Protection Clause of the

United States Constitution by discriminating against out-of-state producers of alcoholic beverages in order to promote the manufacture of alcoholic beverages and the local production of the component materials of alcoholic beverages within Georgia.

UNDISPUTED FACTS

The Court observes that there is no genuine dispute with respect to the following material facts:

1.

James B. Beam Distilling Co. (hereinafter "James Beam") is a Delaware corporation.

2.

James Beam is a producer and importer of alcoholic beverages.

3.

James Beam is engaged in business in interstate commerce throughout the United States.

4.

James Beam is permitted by federal and Georgia authorities to import alcoholic beverages.

5.

James Beam ships and sells alcoholic beverages produced outside the State of Georgia to licensed wholesalers doing business in the State of Georgia.

6.

Defendant Joe Frank Harris is the Governor of Georgia.

7.

Joe Frank Harris is the State Official who has authority, under O.C.G.A. § 48-2-35(a), to authorize a refund of taxes.

8.

Defendant Marcus E. Collins is the Georgia State Revenue Commissioner (hereinafter "Commissioner") and is the State official who is charged with the duty to administer and enforce the State's revenue laws, including the taxes imposed under O.C.G.A. § 3-4-60.

9.

Defendant Claude L. Vickers is the Director of the Fiscal Division of the Department of Administrative Services of the State of Georgia (hereinafter "Fiscal Division").

10.

The Commissioner is directed to remit to the Fiscal Division the taxes (and penalties, interest, and fees) collected under O.C.G.A. § 3-4-60.

11.

The jurisdiction of this Court is predicated upon, and venue in this Court is proper pursuant to, O.C.G.A. § 48-2-35(4)(A).

12.

As a condition to selling alcoholic beverages to Georgia wholesalers, James Beam, during the time period relevant to this action, was required under O.C.G.A. §§ 3-4-60 and 3-4-61 to pay the applicable state excise taxes by purchasing stamps in proper denominations denoting the payment of taxes and affixing such stamps to each bottle or container of alcoholic beverages.

13.

Pursuant to O.C.G.A. 48-2-35(a), a taxpayer shall be refunded any and all taxes which are determined to have been illegally assessed and collected from the taxpayer under the laws of the State of Georgia, whether paid voluntarily or involuntarily,

18.

Because the Refund Claim was not decided by the Commissioner or his delegate within one year from the date of filing, O.C.G.A. § 48-2-35(4) gave James Beam the right to bring an action for refund in this Court.

19.

Pursuant to O.C.G.A. § 48-2-35(5), this action is timely commenced.

20.

Under O.C.G.A. 3-4-60, as codified during the time period relevant to this action, locally produced distilled spirits are taxes at 50 cents per liter.

21.

Under O.C.G.A. 3-4-60, as codified during the time period relevant to this action, locally produced alcohol is taxed at 70 cents per liter.

22.

Under O.C.G.A. § 3-4-60, as codified during the time period relevant to this action, distilled spirits manufactured outside Georgia are taxed at $1.00 per liter.

23.

Under O.C.G.A. § 3-4-60, as codified during the time period relevant to this action, alcohol manufactured outside Georgia is taxed at $1.40 per liter.

24.

All alcoholic beverages covered by O.C.G.A. § 3-4-60, as codified during the time period relevant to this action, are taxed proportionately at the applicable rate on all fractional parts of a liter.

25.

No legislative history or other evidence is contained in the record to support the State's contention that O.C.G.A. § 3-4-60 was originally enacted with a disparity to cover the added cost of regulating this imported product.

26.

O.C.G.A. § 3-4-60 was enacted to encourage Georgia residents to grow products used to produce alcohol and distilled spirits.

CONCLUSIONS OF LAW

1.

O.C.G.A. § 3-4-60 was enacted exclusively for the benefit of Georgia grown products and Georgia manufacturers of alcohol.

2.

The disparity in taxation in O.C.G.A. § 3-4-60 was unrelated to the costs of regulation and enforcement.

3.

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984) provides that if either the purpose or effect of a state tax is to discriminate in favor of local businesses or goods, then the legislation may constitute "simple economic protectionism" and, if so, is virtually per se invalid. This Court holds that, as a matter of law, the effect of O.C.G.A. § 3-4-60 is discriminatory against alcoholic beverages produced outside the state of Georgia in that said beverages are taxed at twice the rate of beverages produced in Georgia from Georgia-grown products. The Twenty First Amendment to the United States Constitution permits the State to discriminate under certain now more clearly defined circumstances where interstate commerce of alcohol is involved.

"[O]nce a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available non-discriminatory means." Main v. Taylor, ____ U.S. ___, 106 S. Ct. 2440, 2448 (1986). This COurt holds that, in view of the facially discriminatory effect of the statute as it existed during the years in question, the burden to show a legitimate local purpose has fallen to the State. The defendants in this action have not met their burden to show a correlation between the higher tax on out-of-state alcoholic beverages and the contended additional costs involved in regulating such beverages, which the defendants claim to be the justification for the disparity.

5.

This Court further holds that the purpose of O.C.G.A. § 3-4-60, as it existed during the years in question, was economic protectionism, i.e., to benefit local business and local industry. This purpose is indicated by the legislative history, 1937-38 Ga.

Twenty First Amendment to the United States Constitution to the statute there under attack saved the State in light of record substantiating the necessity for a higher tax on distilled spirits produced outside Georgia. Such is not the case here. That case involved O.C.G.A. § 3-4-60 as amended in 1985 to alter the preferential taxing scheme by applying an add-on tax on the importation of alcoholic beverages manufactured outside the State of Georgia and the amount of the add-on tax was justified by the present additional expense necessary to regulate this industry. Here, the record before this Court concerning a statute in effect for 30 years, is silent as to any such need existing at the time of its enactment. Viewing the statute attacked here in light of Bacchus one clearly discerns that the original purpose of the 1938 Act was economic protectionism and the Commerce Clause has been violated notwithstanding the authority granted the States under the Twenty First Amendment. The State has shown, via Heublein, that there is a reasonable difference in the costs of administering control over imported and domestic alcoholic beverages. However, the State may not bootstrap its argument contending that this evidence somehow supplies a non violative

purpose for the 1938 Act.

7.

The contention that the statute in question violates the Equal Protection Clause of the Constitution is meritless. Like Heublein this case involves "purely economic matters that traditionally merit only the mildest review under the Fourteenth Amendment." Heublein Inc. v. State of Georgia, 256 Ga. 578, 585 (1987) (quoting Craig v. Boren, 429 U.S. 190, 207 (1976)). The stated purpose of the 1938 Act for "legalizing and controlling" the importation of alcoholic beverages supports a finding that the import tax is rationally related to a legitimate state objective of regulating the importation of alcohol pursuant to the Twenty First Amendment when tested by the requirements solely of equal protection. The disparity in taxes is inconsequential in an equal protection context.

8.

This Court holds that the statute in question, as it existed during the years of 1982, 1983 and 1984 was an unconstitutional infringement upon interstate commerce in violation of the Commerce Clause of the United States Constitution. However,

First, in the present action, the decision of this Court establishes a new principle of law by overruling a past statute on which defendants relied. See Strickland v. Newton County, 244 Ga. 54, 55 (1979); Ashland Oil Inc. v. Rose, 350 S.E.2d 531, 535 (W. Va. 1986). Second, it is unnecessary to address the retrospective operation of the decision of this Court by applying a "weighing of the merits" test since the offending statute was amended in 1985 to remove its Constitutional infirmities and no effort will be made hereafter to assert its validity by defendants. Lastly, the Court declines to apply this decision retroactively since it finds that here, as in a prior Georgia Supreme Court decision, "unjust results would accrue to those who justifiably relied on it." Strickland v. Newton County, 244 Ga. 54, 55 (1979); Preston Carroll Co. v. Morrison Co., 173 Ga. App. 412, 414, rev'd on other grounds, 254 Ga. 608 (1985).

ORDER

Based on the foregoing Findings and Conclusions, it is hereby ORDERED and ADJUDGED as follows:

1.

The Court having considered the entire record including all exhibits submitted hereby GRANTS the Motion for Summary Judgment filed by plaintiff James B. Beam Distilling Company to the extent that it seeks to declare unconstitutional O.C.G.A. § 3-4-60 and the Motion for Summary Judgment filed by defendants is accordingly DENIED.

2.

The Court having found that the test required by Chevron Oil Co. v. Huston has been met, hereby DIRECTS that this decision as it affects the imposition of taxes shall be applied prospectively. The Court hereby DIRECTS that the date of prospective application of this decision shall be the date of the enactment of the amendment to O.C.G.A. § 3-4-60 and shall apply only to tax liability of plaintiff, if any, as of the date the statute was enacted in its present form. Having concluded that this decision should not be applied retroactively so as to allow plaintiff to recover a refund under O.C.G.A. § 42-2-35(b)(1), and that this decision shall apply prospectively, plaintiff shall recover nothing. Further, the Court finds there is no just reason for

delay and DIRECTS that Judgment be entered.

SO ORDERED this 27th day of May, 1988.

/s/
RALPH H. HICKS, JUDGE
Fulton Superior Court
Atlanta Judicial Circuit